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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION.

WALKER WOOD, Secretary of State, Et Al., - Appellants,

versus

STEWART C. BROOM, - - - - - - - Appellee.

BRIEF FOR APPELLEE.

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ROBERT LEE JONES,
Brookhaven, Miss.,
J. H. PRICE,
Magnolia, Miss.,
J. O. S. SANDERS,
CHALMERS COTTER,
Jackson, Miss.,
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WESTERFIELD-SONTS COMPANY, INCORPORATED, LOUISVILLE, KY.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION.

WALKER WOOD, SECRETARY OF STATE, ET AL., - - - - - - *Appellants,*

v.

STEWART C. BROOM, - - - - - - - *Appellee.*

BRIEF FOR APPELLEE.

If this Honorable Court please:

This is a suit to test the validity of House Bill No. 197, Regular Session of the Mississippi Legislature of 1932, better known as the Mississippi Redistricting Act. The case was heard below by a *Special Court,* composed of *Hon. Rufus E. Foster, Circuit Judge, Hon. Edwin R. Holmes* and *Hon. Benjamin C. Dawkins, District Judges,* and their ruling was against the validity of the Act. The case is here under the provisions of *Section 266, Judicial Code* (*28 U. S. C. A., Sec. 380*).

STATEMENT OF FACTS.

Prior to the Fifteenth Census, the State of Mississippi was entitled to elect eight members of the National House of Representatives, commonly known as Congressmen. Under the re-apportionment following that census, the State was allotted seven Congressmen (*House Doc. No. 664*), and it thereupon becomes the duty of the Mississippi Legislature to permit these seven Congressmen to be chosen from the State at large, or to re-arrange the State into seven Congressional Districts, composed

> "of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

This the Legislature essayed to do, and when it finally emerged with its *Redistricting Act* (*House Bill No. 197*), it had arranged the State of Mississippi into seven Congressional Districts, with approximately the number of inhabitants set forth in the following tabulation:

(a) A First District with approximately 241,000 inhabitants.
(b) A Second District with approximately 219,000 inhabitants.
(c) A Third District with approximately 402,000 inhabitants.
(d) A Fourth District with approximately 184,000 inhabitants.
(e) A Fifth District with approximately 244,000 inhabitants.

(f) A Sixth District with approximately 284,000 inhabitants.

(g) A Seventh District with approximately 441,000 inhabitants.

Conceiving that such a statute was within neither the letter nor the spirit of the *Act of Congress of August 8, 1911,* which flowed out of *Art. 1, Sec. 4,* of the *Constitution of the United States,* complainant brought this suit, with the result stated.

It is now the burden of this Court to examine the questions presented and to apply the law, and we shall state and consider these questions as they appear to us to arise on this record.

THE LEGAL ISSUES.

We have not seen a brief for the appellants, and therefore state the questions presented as we see them.

(a) The right to vote when it has once been granted becomes a vested right and so remains until withdrawn by a law of equal dignity with the Act that granted the right.

(b) A citizen who is also a qualified voter, may invoke the aid of equity to protect his right to exercise his suffrage in all legal ways, for the right of suffrage when conferred is both political and legal.

(c) The right to vote for Congressmen flows out of the Constitution of the United States to all those to whom that right has been granted by the States. It is guaranteed and protected by the Federal Constitution.

(d) The Congress has power to control congressional elections, and when it speaks to that end its enactments are controlling on the several States. The *Act of August 8, 1911 (2 U. S. C. A., Sec. 3, 37 Stat. at L. 14)* is a valid exercise of that power by Congress, is still in force and unrepealed.

We shall now proceed as briefly as may be to examine each of these questions.

I.

One who is deprived of the right of equal suffrage in the choice of federal officers, when that right has been granted by a State, is deprived of a vested right under the *Constitution of the United States* and of one which equity as administered in the Federal Courts will protect.

(a) Cooley, Principles of Constitutional Law, p. 248.
(b) Gougar v. Timberlake, 148 Ind. 41, 46 N. E. 339, 62 Am. St. Rep. 489, 37 L. R. A. 648.
(c) *Ex parte* Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152, 28 L. Ed. 274.
(d) Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17, 45 L. Ed. 84.

The right of suffrage is not a natural right attendant on citizenship (*Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136; Spencer v. Board of Registration, 1 MacArthur, 169, 29 Am. Rep. 582; Gougar v. Timberlake, 148 Ind. 38, 46 N. E. 339, 62 Am. St. Rep. 489, 37 L. R. A. 648*). But the right to vote for Congressmen and Senators is a right which springs fundamentally from the Federal Constitution, which created

the offices, made them elective and pointed out who should be electors (*Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152, 28 L. Ed. 274; Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17, 45 L. Ed. 84; Pope v. Williams, 193 U. S. 621, 24 Sup. Ct. Rep. 573, 48 L. Ed. 817*), and when once the right of suffrage has been conferred by a State, it becomes a vested right entitled to protection just as property is entitled to be protected.

The right of suffrage in Mississippi to citizens of that State and which is to be exercised as to both State and Federal officers, is conferred by *Art. 12, Sec. 241,* of the *Constitution of Mississippi,* which reads thus:

> Every male inhabitant of this State, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this State two years, and one year in the election district, or in the incorporated city or town, in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister

> of the gospel in charge of an organized church shall be entitled to vote after six months' residence in the election district, if otherwise qualified.

The right thus conferred is a vested right until altered by the fundamental law is conferred by the Constitution of the United States, and to be protected in equity as rights of property are protected.

That the right to vote for members of Congress is a vested right conferred by the *Constitution of the United States* is settled by *Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. Rep. 152, 28 L. Ed. 274,* and *Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. Rep. 17, 45 L. Ed. 84.* In the latter case it was said by *Mr. Justice Gray:*

> The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States.
>
> This is clearly and amply set forth in *Ex parte* Yarbrough, 110 U. S. 651, 28 L. Ed. 274, 4 Sup. Ct. Rep. 152, in which this court, speaking by Mr. Justice Miller, upheld a conviction in a circuit court of the United States under Sec. 5508 and 5520 of the Revised Statutes for a conspiracy to intimidate a citizen of the United States in the exercise of his right to vote for a member of Congress, and answered the proposition "that the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each state respectively," as follows:

But it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution, and by that alone. It also declares how it shall be filled, namely, by election. Its language is: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Art. 1, Sec. 2. The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state." 110 U. S. 663, 28 L. Ed. 278, 4 Sup. Ct. Rep. 152.

The court then, referring to the statement of Chief Justice Waite in Minor v. Happersett, 21 Wall. 162, 178, 22 L. Ed. 627, 631, that "the Constitution of the United States does not confer the right of suffrage upon anyone," explained that statement as follows: "But the court was

> combatting the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification of voters for members of Congress that which prevails in the state where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of the state for the description of the class. But the court did not intend to say that, when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors." 110 U. S. 664, 28 L. Ed. 278, 4 Sup. Ct. Rep. 152.

And that this right when conferred is entitled to protection is thus laid down in *Cooley's Principles of Constitutional Law,* p. 248, thus:

> Participation in the suffrage is not of right, but it is granted by the state on a consideration of what is most for the interest of the state. Nevertheless, the grant makes it a legal right until it is recalled, and it is protected by the law as property is.

We think that the right to cast a vote for a Congressman of the United States

(a) Is a vested right.

(b) Guaranteed by the Constitution of the United States.
(c) And entitled to protection when in any way infringed.

and that if Congress has ordained that the right may be exercised in a certain way, that then equity will see to it that the owner of the right may so exercise it.

In Mississippi the right to vote for all offices, State and Federal, was conferred on all male inhabitants, of a certain age and of a certain description (*Const. Miss., 1890, Art. 12, Sec. 241, supra*). By the *XIXth Amendment* to the *Federal Constitution*, the right to vote was also conferred on the female citizens of Mississippi, who possessed the same qualifications as those required of males by the Constitution of that State.

It was ordained by *Congress* in *1911* (*Act August 8, 1911, Ch. 5, Sec. 3, 2 U. S. C. A., Sec. 3, 37 Stat. at L. 14*), that in the election of Congressmen, this right of suffrage, if the State were parceled into districts, should be exercised in districts made up of territory

(a) That was contiguous.
(b) That was compact.
(c) And that contains as nearly as may be an equal number of inhabitants.

and therefore it may be said we think that one qualified to vote for members of Congress may demand as a matter of constitutional right that he be so placed by the Legislature that he may cast his vote in a district constructed according to the plan laid down by

Congress. If he is by a State Legislature denied this right then equity will enforce it by declaring the State Act which infringes it unconstitutional and invalid (*Hume v. Mahan, District Court Eastern District of Kentucky, September 3, 1932, not yet reported*).

II.

A qualified voter in a State, who is denied the right of equal representation by a State Congressional Redistricting Act, may complain against the Act in equity in a Federal Court, in his own name and person.

(a) Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.

(b) Koenig v. Flynn, 285 U. S. ——, 52 Sup. Ct. Rep. 403, 76 L. Ed. 608.

(c) Carroll v. Becker, 285 U. S. ——, 52 Sup. Ct. Rep. 402, 76 L. Ed. 609.

(d) U. S. Rev. Stat., Sec. 563, par. 12, Sec. 629, par. 16, 36 Stat. at L. 1092, 4 Fed. Stat. Ann. 840, 28 U. S. C. A., Sec. 41, par. 14.

Analogous to this proposition are the holdings of the various State Courts, in respect of allowing relief in equity to a qualified voter, who is aggrieved by legislation arranging the State into State Representatives and Senatorial Districts, so as to deny equality of representation as near as may be (*Hagar v. Robinson, 154 Ky. 489, 157 S. W. 1138; Schardein v. Harrison, 230 Ky. 1, 18 S. W. (2d) 316; Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865, 128 Am. St. Rep. 242; Yate's Clerk v. Collins, 118 Ky. 682, 82 S. W. 282;*

Stiglitz v. Schardein, 239 Ky. 799, 40 S. W. (2d) 315; State v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27; Williams v. Secretary of State, 145 Mich. 447, 108 N. W. 749; Denny, et al., v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726; Harmison v. Ballot Commissioners, 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; State v. Wrightson, 56 N. J. Law, 126, 28 A. 56, 22 L. R. A. 548; Giddings v. Secretary of State, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 492; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Board of Sup'rs of County of Houghton v. Blacker, Secretary of State, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; People v. Thompson, 155 Ill. 451, 40 N. E. 307; People v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; Baird v. Supervisors, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81).

We can perceive no good reason why this right to seek relief should be denied a suitor by this Court, when it is allowed in all the States to one aggrieved by legislation of purely State concern. It has been held by this Court that the prime object of all litigation is to establish a right asserted by a plaintiff or to sustain the opposing defense (*Tyler v. Judges of the Court of Registration, 179 U. S. 405, 21 Sup. Ct. Rep. 206, 45 L. Ed. 252*), and the right of suffrage when conferred is an individual, personal right, and the right to complain of its infringement is personal to its possessor.

That the right of equality of representation is a

valuable right is merely the assertion of a fact established by history (*3 Woodrow Wilson History of the United States, 98-183*), and it is the corner stone to the foundation of all representative government (*Dicey Law of the Constitution, p. LXVI*). Its value is thus described by *Judge Barker* in *Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865, 128 Am. St. Rep. 242:*

> The definition of equality of representation as above contained, and the principle that any act of the legislature which violates a constitutional requirement for that equality of representation is void, is sustained by the following authorities: State v. Cunningham, 83 Wis. 90, 35 Am. St. Rep. 27, 53 N. W. 35, 17 L. R. A. 145; Williams v. Secretary of State, 145 Mich. 447, 108 N. W. 749; Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 126; Harmison v. Ballot Commissioners, 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; State v. Wrightson, 56 N. J. L. 126, 28 Atl. 56, 22 L. R. A. 548; Giddings v. Secretary of State, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; Commissioners v. Blacker, 92 Mich. 638, 52 N. W. 951, 16 L. R. A. 432; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; People v. Thompson, 155 Ill. 451, 40 N. E. 307; People v. Rice, 185 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; Baird v. Supervisors, 138 N. Y. 95, 33 N. E. 827, 20 L. R. A. 81. He has studied our constitution in vain who has not discovered that the keystone of that great instrument is equality—equality of men, equality of representation, equality of burden, and equal-

ity of benefits. Section 1 of the Bill of Rights provides: "All men are by nature free and equal." Section 33 provides for equality of representation. Sections 171, 172, 173 and 174 provide for equality of taxation (uniformity). Section 39 provides for equality (general) of laws. Indeed, it could not be otherwise, for when our forefathers emigrated from their European home it was in the main to escape from the oppression of inequality. They brought with them a burning love for this great democratic principle and imbedded it deep in the foundation of the empire they were destined to erect, and which they will preserve so long as the love of liberty is more than a name. When they threw off the supervising government of the mother country, it was because they were denied equality of representation; or, as they then expressed the evil, they had imposed upon them taxation without representation.

Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality Republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit. To say that a man in Spencer County shall have seven times as much influence in the government of the state as a man in Ohio, Butler or Edmonson, is to say that six men out of every seven in those counties are not represented in the government at all. They are required to submit to taxation without representation. It was this kind of oppression which inspired that great struggle for freedom

> which began on Lexington Green in 1775, and ended at Yorktown in 1781. Equality of representation is the basis of patriotism. No citizen will, or ought to, love the state which oppresses him; and that citizen is arbitrarily oppressed who is denied equality of representation with every other citizen of the commonwealth.

That this right may be enforced in equity in the Federal Courts at the suit of one aggrieved may be gathered from the cases of *Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.* We have the transcript in that case before us and the right and interest of the complainant is thus set down in the Bill of Complaint:

> The petition of W. Yale Smiley respectfully shows to the Court that he is a citizen, elector and taxpayer of the State of Minnesota, residing in the City of Minneapolis, Hennepin County, Minnesota, in the Fourth Ward of said City.

In *Koenig v. Flynn, 285 U. S. ——, 52 Sup. Ct. Rep. 403, 76 L. Ed. 608,* the right and interest of complainant is thus described:

> The petitioners by Abraham S. Gilbert and Benjamin L. Fairchild, their attorneys, for their petition herein allege:
>
> First: That they are severally citizens and qualified voters of the State of New York, and that the petitioner Samuel S. Koenig is the Chairman of the Republican County Committee of New York County; that the petitioner John J.

> Knewitz is the Chairman of the Republican County Committee of Bronx County; and that the petitioner William L. Ward is the Chairman of the Republican County Committee of Westchester County.

In *Carroll v. Becker, 285 U. S. ——, 52 Sup. Ct. Rep. 402, 76 L. Ed. 609,* it is thus described:

> This Relator respectfully represents and shows to this Honorable Court that he is a citizen, inhabitant and elector of the State of Missouri, and resides in the City of St. Louis, Missouri, in the Fifth Ward of said City, and that he is now 28 years of age, and is, and since the time of his birth, has been a citizen of the United States of America.

That this right may be enforced in the Federal Courts is expressly provided by *Rev. Stat. U. S., Sec. 563, par. 12, Sec. 629, par. 16, Act of March 3, 1911, Ch. 231, Sec. 24, par. 14, 36 Stat. at L. 1092, 4 Fed. Stat. Ann. 840, 28 U. S. C. A., Sec. 41, par. 14,* which provides that the Courts of the United States shall have jurisdiction:

> Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States or of any right secured by any law of the United States providing for equal rights of citizens of the United

States, or of all persons within the jurisdiction of the United States.

If the right to vote is a civil right, and it is, and if it is to be exercised, so that all men shall stand on an equal footing in acquiring representation, then that right is infringed by an Act which makes one man in one district equal to two and a half men in another, and the right may be enforced by declaring the Act invalid and putting the election to the State at large, thus insuring absolute equality.

III.

The power to regulate the election of members of the National House of Representatives resides in Congress. When it has spoken its regulations are paramount and controlling on the States.

(a) *Ex parte* Siebold, 100 U. S. 371, 25 L. Ed. 717.
(b) Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.
(c) People *ex rel.* v. Voorhis, 222 N. Y. 494, 119 N. E. 106.
(d) Hume v. Mahan, Dist. Ct. East. Dist. Ky., Sept. 3, 1932 (not yet reported).

Members of Congress are officers of the United States, made so by the Constitution. The several States have no concern with their tenure, salary, powers, or duties and no powers at all save to provide for their election, as Congress may direct. In the absence of congressional action, the States might regulate the entire mode of electing Congressmen, and as a matter

of fact prior to 1842, the whole matter of electing Congressmen was left open to the States.

Judge Cochran of the *Eastern District of Kentucky* has in *Hume v. Mahan* (*September 3, 1932,* not yet reported) given a history of the growth of congressional legislation, respecting the election of members of Congress as follows:

> Section 3 of the Act of 1911 enacted pursuant to the Constitution provides for such representation amongst the citizens of the several states. The right thereto is thereby conferred upon them and secured to them.
>
> Until 1842 the respective States were left to their own devices as to the manner of electing Representatives in Congress. Some were elected from the State at large, but in a large part the States were divided by their respective Legislatures into Congressional Districts and their Representatives in Congress were elected from these districts. For the first time, by the Act of June 25, 1842 (5 U. S. Statutes at Large, 491), the Congress asserted its power over the method of selecting its members. Section 2 of that Act required that Congressmen should be elected by districts composed of contiguous territory, but no provision was made for equality of population.
>
> The law continued in this condition until 1872, when Congress, by the Act of January 2, 1872 (17 U. S. Statutes at Large, 28), added to the requirement of contiguous territory the further requirement that each district should contain as nearly as practicable an equal number of inhabitants, and similar provisions were incorporated

in the Act of February 25, 1882 (22 U. S. Statutes at Large, 5), and in the Act of February 7, 1891 (26 Statutes at Large, 735). By the Act of February 16, 1901 (31 U. S. Statutes at Large, 735), Congress added to the requirement of contiguous territory and equality of population the further requirement that the districts should be compact, and this provision of the Act of 1901 was carried over in identical language into Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.).

That *Congress* may under *Art. 1, Sec. 4,* of the *Constitution* assume and direct the whole subject of election of its members is settled in this *Honorable Court,* and in various *State Courts,* and that when Congress legislates on the subject, its mandates are paramount and supersede all State enactments is equally settled.

In *Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, Mr. Justice Bradley* said:

> The clause of the Constitution under which the power of Congress, as well as that of the State Legislatures, to regulate the election of Senators and Representatives arises, is as follows: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."
>
> It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petitioners. After first authorizing the States to prescribe the regulations, it is added:

"The Congress may at any time, by law, make or alter such regulations." "Make or alter." What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and National Governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be either wholly by the State Legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary cooperation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to "make or alter."

* * * * * * * *

So in the case of laws for regulating the elections of Representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The para-

mount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

In *Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600,* the *Court* said:

> This view is confirmed by the second clause of Article 1, section 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provided independent sanctions. It "has a general supervisory power over the whole subject." *Ex parte* Siebold, 100 U. S. 371, 387; *Ex parte* Yarbrough, 110 U. S. 651, 661; *Ex parte* Clarke, 100 U. S. 399; United States v. Mosley, 238 U. S. 383, 386; Newberry v. United States, 256 U. S. 232, 255. But this broad authority is conferred by the constitutional provision now under consideration and is exercised by the Congress in making "such regulations," that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the legislature of the State upon the same subject.

And see the other cases cited *supra.*

We think, therefore, that if it were within the power of *Congress* to enact the *Act of August 8, 1911,* and if that Act is still in force, it provides the paramount power in the States to arrange themselves into Congressional Districts.

IV.

The *Act of Congress of August 8, 1911 (Act of August 8, 1911, Ch. 5, Sec. 3, 37 Stat. at L. 14, 2 U. S. C. A. Sec. 3),* is a valid exercise of congressional power and is still in force.

(a) Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600.
(b) Hume v. Mahan (Dist. Ct. East. Dist. Ky., Sept. 3, 1932, not yet reported).

There may be some contention that the *Act of August 8, 1911,* was repealed and superseded by the *Act of June 18, 1929. Sections 1* and *2* of the *1911 Act* were superseded by the later statute, for they dealt only with the apportionment of representatives under the thirteenth census, but there is nothing in the *1929 Act* that is in conflict with *Section 3* of the *1911 Act.*

In *Smiley v. Holm, 285 U. S. 355, 52 Sup. Ct. Rep. 397, 76 L. Ed. 600,* the *Court,* through *Mr. Chief Justice Hughes,* said:

> The further question has been presented whether the Act of Congress of August 8, 1911, is still in force. The state court held that it was not, that it had been wholly replaced by the Act of June 18, 1929. Sections 1 and 2 of the former Act, making specific provision for the apportion-

ment under the thirteenth census, are of course superseded; that present question relates to the other sections. *These have not been expressly repealed.* The Act of 1929 repeals "all other laws and parts of laws" that are inconsistent with its provisions (sec. 21). The petitioner urges that this Act contains nothing inconsistent with sections 3, 4 and 5 (8) of the Act of 1911, and the only question is whether these sections by their very terms have ceased to be effective. It is pointed out that the provisions of the Act of 1911 were carried into the United States Code. U. S. C., Tit. 2, secs. 2-5. Inclusion in the Code does not operate as a re-enactment; it establishes "*prima facie* the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925." Act of June 30, 1926, c. 712, 44 Stat. 1. While sections 3 and 4 of the Act of 1911 expressly referred to "this apportionment" (the one made by that Act), the argument is pressed that they contain provisions setting forth a general policy which was intended to apply to the future creation of congressional districts, and the election of representatives, until Congress should provide otherwise.

There are three classes of States with respect to the number of representatives under the present apportionment pursuant to the Act of 1929, (1) where the number remains the same, (2) where it is increased, and (3) where it is decreased. In States where the number of representatives remains the same, and the districts are unchanged, no question is presented; there is nothing inconsistent with any of the requirements of the Con-

gress in proceeding with the election of representatives in such States in the same manner as heretofore. Section 4 of the Act of 1911 provided that in case of an increase in the number of representatives in any State, "such additional representative or representatives shall be elected by the State at large and the other representatives by the districts now prescribed by law" until such State shall be redistricted. The Constitution itself provides in Article 1, Section 2, that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States," and we are of the opinion that under this provision, in the absence of the creation of new districts, additional representatives allotted to a State under the present reapportionment would appropriately be elected by the State at large. Such a course, with the election of the other representatives in the existing districts until a redistricting act was passed, would present no inconsistency with any policy declared in the Act of 1911.

Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all representatives allotted to the State must be elected by the State at large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import.

This conclusion disposes of all the questions properly before the Court. Questions in relation to the application of the standards defined in Section 3 of the Act of 1911, to a redistricting statute, if such a statute should hereafter be enacted, are wholly abstract. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

In *Hume v. Mahan (Dist. Ct. East. Dist. Ky., Sept. 3, 1932,* not yet reported) *Judge Cochran* said:

> One of the succeeding paragraphs referred to is paragraph 14, which given Federal Court jurisdiction:
>
> > "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."
>
> In my opinion federal jurisdiction of this cause exists under this provision. It is a suit in equity to redress the deprivation under color of a statute of this state of a right secured by a law of the United States providing for equal rights of its citizens—the right of approximately equal representation in Congress. It is so secured by Section 3 of the Act of August 8, 1911

(37 Stat. 14) which according to my interpretation of the decision in Smiley v. Holm, 285 U. S. 355, is still in force. It provides:

> "In each state entitled under this apportionment to more than one representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

This provision was enacted under authority of Section 4 of Article 1 of the Federal Constitution which empowers Congress to make regulations as to the times, places and manner of holding elections for Representatives. Section 2 of the 14th amendment provides for approximately equal representation amongst the several states. The necessary result of such an apportionment is to put the whole body of people in each State on a voting equality with those in every other State; and if, under this plan of apportionment, each State should choose its Representatives in Congress from the State at large, each Congressional voter in each State would not only be on a voting equality in congressional elections with every other vote in his own state, but he would be on an equality with every other such elector in every other State.

Since there is nothing, therefore, in the *Act of June 18, 1929,* which expressly or by necessary implication repeals *Section 3 of the Act of August 8, 1911,* we think it may be taken to be still in force.

V.

The right to make reasonable qualifications for party membership is a political matter with which equity has naught to do. But the right to vote is a legal right that equity will protect.

(a) Grigsby v. Harris, 27 Fed. (2d) 942.
(b) McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36 L. Ed. 869.
(c) Nixon v. Herndon, 273 U. S. 536, 47 Sup. Ct. Rep. 446, 71 L. Ed. 759.
(d) Love v. Griffith, 266 U. S. 32, 45 Sup. Ct. Rep. 12, 69 L. Ed. 157.
(e) Nixon v. Condon, 285 U. S. ——, 52 Sup. Ct. Rep. 484, 76 L. Ed. 629.

One of the chiefest positions of those who oppose suits after this fashion is that the basis of the suit is a political fight, and that equity has no jurisdiction to enforce, protect or guide it and we freely admit that were the right sought a purely political right as distinguished from a legal one, equity would have no jurisdiction to entertain any questions of it. (*4 Pomeroy, Equity Jurisprudence, Sec. 1746, Georgia v. Stanton, 6 Wall. 50, 18 L. Ed. 721*). But this is not such a question. It is the assertion of a legal right and an assertion of the right to exercise that right in an ordained way. Much reliance is placed by those who oppose these suits on *Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. Rep. 639, 47 L. Ed. 909,* and of that case *Judge Cochran,* in *Hume v. Mahan* (*Dist. Ct. East. Dist. Ky., Sept. 3, 1932,* not yet reported), said:

The defendant strongly urges that the case of Giles v. Harris, 189 U. S. 175, is conclusive authority for the position that a court of equity has no jurisdiction to enforce a legal right of a political nature. As I view that decision it is an authority to the contrary of this. It upholds the position that a court of equity has such jurisdiction if there is no adequate remedy at law. What is relied on is two expressions of Mr. Justice Holmes in the court of his opinion. He said:

> "The traditional limits of the proceedings in equity have not embraced a remedy for political wrongs."

Again he said:

> "The other difficulty is of a different sort and strikingly reenforces the argument that equity cannot undertake now any more than it has in the past to enforce political rights."

The significance of these expressions will be considered after it is pointed out what was actually decided by the case. It was a suit in equity brought in September, 1902, in the United States Circuit Court for the Northern District of Alabama by a negro against the Board of Registrars of Montgomery Court in that State. The constitution thereof provided for registration in order to vote. It made a difference in the tests for registration before January 1, 1903, from what they were thereafter. The tests prescribed for the prior registration were easier than those for the later. The registration prior to that date was for life. Probably such was the case for the

later. The plaintiff alleges that he was qualified to register under the tests prescribed prior to January 1, 1903. In March, 1902, he applied to the defendants for registration and was refused. Before August 1, 1902, numerous other qualified negroes had so applied and been likewise refused. The bill was filed on their behalf as well as plaintiff. It charged in substance that a scheme had been devised by the great mass of the white population of the State to disfranchise the negroes thereof. The provisions of its constitution as to registration and voting which they had adopted had been so shaped as to give an opportunity for such disfranchisement. The intention was that they should be so administered as to let in all the whites and keep out a large part, if not all, the negroes. The defendants were parties to this scheme and accepted their offices for the purpose of carrying it out. As was intended these provisions had been so administered as to effect this purpose. The plaintiff and the negroes on whose behalf the suit was brought, though qualified to register, had been arbitrarily excluded from registering before January 1, 1903, and the same thing had been done all over the State. On the other hand the white men generally had been permitted to register. The tests prescribed for registration after January 1, 1903, were too severe to permit of the negroes registering thereafter. Furthermore it was the intention of the great mass of the white population to keep the negroes from ever voting. Based on these allegations it was claimed that these provisions of the Constitution of the State were contrary to the federal

constitution. The relief prayed was twofold. In substance it was the defendants be required to enroll the names of plaintiff and the negroes on whose behalf he sued upon the voting lists and that the provisions of the Alabama constitution relating to registration and voting be declared to be contrary to the 14th and 15th amendments of the Constitution of the United States. The lower court dismissed the bill for want of jurisdiction as a federal court and for want of equity. The Supreme Court affirmed this decree. It did not do so for want of federal jurisdiction. It held that such jurisdiction existed. It may be said that it affirmed it on the ground of want of equity. This it did, not because of the political nature of the relief sought, but because plaintiff was not entitled to the relief which he sought. He was not entitled to a declaration that the provisions of the State Constitution in question were unconstitutional and void because it would be "a mere declaration in the air." He was not entitled to the compulsory registration sought for two reasons. One was that according to plaintiff's claim the constitutional provisions as to registration were invalid. The defendants should not be required to proceed to act under an invalid law. The other reason was that such registration would be useless. It would do plaintiff no good. The names of himself and the other negroes on a "piece of paper" would not defeat the intent of the great mass of the white people of the state to keep him from voting. The only possible way in which this could be brought about was for the federal court "to supervise the voting" by its

"officers." This Mr. Justice Holmes said was the "chief purpose" or "main object" of the bill. This relief could not be granted because the state itself could not be sued and the "court had little practical power to deal with the state in a body." He said:

> "Apart from damages to the individuals relief from a great political wrong, if done as alleged, by the people of the state itself must be given by them or by the legislative and political department of the state."

It was for such a political wrong as that charged in the bill, *i. e.*, the disfranchisement of the negroes by the white people of the state, that Mr. Justice Holmes in the first statement relied on by defendant had in mind when he said equity afford no remedy for "political wrongs" and it was the right to be free from such a wrong that he had in mind when he said in the second statement that equity could not enforce "political rights." He did not mean by either statement that equity had no jurisdiction to compel the defendants to register the plaintiff and the negroes on whose behalf he sued because of the political nature of the right sought to be enforced. He assumed as a matter of course that it did have such jurisdiction and hence considered the question on its merits. The right to the relief sought was denied not for want of equitable jurisdiction but for the two reasons stated, to-wit: the registration provisions were invalid and registration would do them no good according to the allegations of the bill. Hence this decision instead of being an authority for the position that equity cannot enforce a

legal right which is of a political nature is a direct authority in support of the position that it can if there is no adequate remedy at law. It is to be noted that Mr. Justice Brewer who dissented on the ground that the decision of the Supreme Court should be limited to the question of federal jurisdiction and the decree reversed and case remanded for further proceeding in the lower court held that the plaintiff was entitled to the relief sought. He said:

> "That such relief will be given has been again and again affirmed in both national and state courts."

And further that Mr. Justice Harlan who dissented on the ground that the decree of the lower court should be affirmed for want of federal jurisdiction said:

> "I agree with Mr. Justice Brewer that it is competent for the courts to give relief in such cases as this."

In *McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. Rep. 3, 36 L. Ed. 869,* the question was of the manner of electing Presidential Electors, and in answer to the objection that it was purely a political question, *Mr. Chief Justice Fuller* said:

> It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a Presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be sub-

ject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally the Congress.

But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such Constitution and laws, and its validity was sustained. Boyd v. Thayer, 143 U. S. 135 (36:103). And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. Hartman v. Greenhow, 102 U. S. 672 (26:271).

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own.

In *Love v. Griffith, 266 U. S. 32, 45 Sup. Ct. Rep. 12, 69 L. Ed. 157,* the bill was to enjoin a political committee from enforcing a rule that negroes should not be allowed to vote in a primary election, had already

been held and the question had become moot. For that reason and since no injunction then granted could be made effective the judgment below was affirmed; but in the course of that opinion, *Mr. Justice Holmes,* who delivered the opinion in *Giles v. Harris, supra,* said:

> If the case stood here as it stood before the court of first instance, it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up.

In *Nixon v. Herndon, 273 U. S. 536, 47 Sup. Ct. Rep. 446, 71 L. Ed. 759,* the action was at law against certain judges of a Democratic primary election to recover damages, because they had refused to allow plaintiff to vote in that primary. The action was at law, and it was urged against plaintiff's right that the subject matter of the action was purely political. *Mr. Justice Holmes* again writing said:

> The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political act and may be recovered for in a suit at law hardly has been doubted for over two hundred years.

and in support of the holding the Court cited *Wiley v. Sinkler* and *Giles v. Harris, supra,* one an action at law the other a suit in equity showing that the Court

would enforce a legal right whether asserted at law or in equity.

In *Nixon v. Condon, 285 U. S. ——, 52 Sup. Ct. Rep. 484, 76 L. Ed. 629, Mr. Justice Cardozo* said:

> With the problem thus laid bare and its essentials exposed to view, the case is seen to be ruled by Nixon v. Herndon, *supra.* Delegates of the state's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. *Ex parte* Virginia, *supra;* Buchanan v. Warley, 245 U. S. 60, 77, 38 S. Ct. 16, 62 L. Ed. 149, L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.

In *Grigsby v. Harris, 27 F. (2d) 942,* the *Court* said:

> Against this view is the excellently reasoned case of Gilmore v. Waples, 108 Tex. 167, 188 S. W. 1037, in which, reviewing the cases for and against, the Supreme Court of Texas declares that, "if there is no provision of law interdicting the proposed action of" a party "committee, no legal right of the plaintiff can be said to be threatened with impairment, and the case presents" but "a party dispute. * * * On the other hand, if the proposed action of the committee is prohibited by law, a judicial question is presented; and, if such action threatens" the legal rights of plaintiff for the relief "of which no * * * legal remedy exists, his right to equitable relief cannot be de-

nied," and he reasons, I think with great power, that, while equity will not grant relief where the right asserted is a political, as opposed to a legal, right, equity will grant relief where the right claimed rests upon law, even though the subject-matter of that right be political, and I incline to think that those cases which have so uniformly affirmed the want of power in a court of equity to grant relief are all cases which either were, or by the court deciding them were held to be, cases where plaintiff's rights were only political, and therefore extra legal. That the political character of the subject-matter of the right could not prevent relief in equity I think more reasonable, and I incline to think, with Mr. Justice Holmes, that "the objection that the subject-matter of the suit is political is little more than a play upon words." Nixon v. Herndon, 273 U. S. 536, 47 S. Ct. 446, 71 L. Ed. 759. And while that expression is used in a law case, his failure in Love v. Griffith, 266 U. S. 33, 45 S. Ct. 12, 69 L. Ed. 157, to suggest the fatal obstacle, that the subject-matter was political, tends to support the view that the Supreme Court of the United States, in a proper case, would agree with the holding of the Supreme Court of Texas, in Gilmore v. Waples, that equity could grant relief.

We venture to think, therefore, that courts of equity in the United States have jurisdiction to protect the fundamental right of suffrage.

CONCLUSION.

This brief has been hurriedly prepared. It does not measure up to our ideas of what a brief should be and contain, and the Court will doubtless discern many imperfections in it, but we ask the indulgence of this Honorable Court, because of the necessary haste involved in its preparation.

We respectfully ask that the decree of the District Court be affirmed.

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Pineville, Kentucky,
October 5, 1932.

FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1932

No. 424

WALKER WOOD, SECRETARY OF STATE, OF STATE OF MISSISSIPPI,

Appellant,

vs.

STEWART C. BROOM,

Appellee.

APPENDIX TO APPELLEE'S BRIEF

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Of Counsel.

The Fraternity Press, Washington, D. C.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF KENTUCKY

Frankfort

JAMES J. HUME, *Plaintiff*

v 1143.

SARA W. MAHAN, *Secretary of State of the Commonwealth of Kentucky, Defendant.*

COCHRAN, District Judge:

This is an action in equity for an injunction against the defendant, the regularly elected, qualified and acting Secretary of State of the Commonwealth of Kentucky, to restrain her from certifying to the county court clerks of the counties comprising the nine congressional districts laid off by the provisions of Chapter 145 of the 1932 Act of the General Assembly of the Commonwealth of Kentucky, under the congressional reapportionment following the fifteenth decennial census, the names of candidates for the nomination of their respective parties for Representatives in Congress in the respective districts so laid off. The basis of the action is that Chapter 145 violates Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.) which provides that Representatives in Congress from each state be elected by districts composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants.

When the suit was first called to my attention, I was not satisfied in my own mind that the case was one that

might be heard and determined by a district judge, without calling to his assistance two other judges, as provided in Section 266 of the Judicial Code, Section 380, Title 28, U. S. C. A. I accordingly invited Moorman, Circuit Judge and Dawson, District Judge, to sit with me, which they did. Upon the hearing it was assumed by counsel on both sides that the case was one which required a hearing by three judges. Judges Moorman and Dawson are of opinion, however, it is not such a case, but that the matters involved may be determined by the District Judge alone. I am not myself sure that this is not correct. Section 266 of the Judicial Code provides for three judges where the claim is that the statute of a state is unconstitutional. The claim here is not that the legislation in question is unconstitutional, but that it is violative of a federal statute. Hence it is not within the letter of the three judge provision though it may be within the spirit. Cf. Michigan Central Railroad Co. v. Michigan Public Utilities Commission, 271 Fed. 319-321. In deference, therefore, to the views of the judges who sat with me, and in view of my own doubt on the subject, the opinion is handed down as my opinion. In order, however, that the defendants may not be cut off from any right of appeal from the decision herein as three judge decision, if they are of opinion that it is a case that requires a decision of such a court and not one which a single judge is authorized to determine, I am authorized to say that both Judges Moorman and Dawson concur in the results that I have reached, and both have, for the purpose indicated, signed an order in conformity therewith, granting the injunction sought.

The defendant attacks the jurisdiction of this court, as a Federal Court, on the ground that the jurisdictional amount is lacking; and, as a court of equity, on the ground that the matter involved is political in its nature. Each attack will be considered in its order.

Whilst plaintiff's original bill seeks relief both as a taxpayer and as a legally qualified congressional elector, it is quite apparent from the record that plaintiff's interest as a taxpayer is not in excess of $3,000, and if plaintiff is entitled to maintain his action, he must do so in his capacity as a legal voter entitled to participate in congressional elections. It is well settled that the right to vote is a valuable right, capable of being measured in money, and that Federal Courts as such, in a proper case, have jurisdiction to redress deprivation of this right. Wiley v. Sinkler, 179 U. S. 58; Nixon v. Herndon, 273 U. S. 536; Nixon v. Condon, decided by the Supreme Court of the United States May 2, 1932. In the case of

Giles v. Harris, 189 U. S. 475.

it was said:

> "We have recognized too that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money."

Possibly the right of equal representation in Congress is likewise capable of estimation in money. But the bill and amended bill contain on allegation to the effect that plaintiff's right in this respect exceeds the sum or value of $3,000.00. The original bill does contain an allegation that the amount in controversy exceeds the sum or value of $3,000.00 but a careful reading of the bill discloses that this allegation is made in respect of the costs which would be incurred by the State and counties in holding a congressional election in the alleged illegal districts. Therefore, on the face of the bill and amended bill, if this court as a Federal Court has jurisdiction of this controversy, this jurisdiction must be found in some provision of Section 24 of the Judicial Code (Title 28, Section 41, U. S. C.) which does not make the amount in controversy a jurisdictional requirement. Section 24 of the Judicial Code,

after enumerating certain cases in which the sum or value of the amount in controversy must exceed $3,000.00 contains the following provision:

> "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

One of the succeeding paragraphs referred to is paragraph 14, which gives Federal Court jurisdiction:

> "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

In my opinion federal jurisdiction of this cause exists under this provision. It is a suit in equity to redress the deprivation under color of a statute of this state of a right secured by a law of the United States providing for equal rights of its citizens—the right of approximately equal representation in Congress. It is so secured by Section 3 of the Act of August 8, 1911 (37 Stat. 14) which according to my interpretation of the decision in

Smiley v. Holm, 285 U. S. 355

is still in force. It provides:

> "In each state entitled under this apportionment to more than one representative, the Representatives to Congress shall be elected by districts composed of a contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants."

This provision was enacted under authority of Section 4 of Article 1 of the federal constitution which empowers Congress to make regulations as to the times, places and manner of holding elections for Representatives. Section 2 of the 14th amendment provides for approximately equal representation amongst the several states. The necessary result of such an apportionment is to put the whole body of people in each State on a voting equality with those in every other State; and if, under this plan of apportionment, each State should choose its Representatives in Congress from the State at large, each Congressional voter in each State would not only be on a voting equality in congressional elections with every other vote in his own state, but he would be on an equality with every other such elector in every other State.

Section 3 of the Act of 1911 enacted pursuant to the Constitution provides for such representation amongst the citizens of the several states. The right thereto is thereby conferred upon them and secured to them.

Until 1842 the respective States were left to their own devices as to the manner of electing Representatives in Congress. Some were elected from the State at large, but in a large part the States were divided by their respective Legislatures into Congressional Districts and their Representatives in Congress were elected from these districts. For the first time, by the Act of June 25, 1842, (5 U. S. Statutes at Large, 491) the Congress asserted its power over the method of selecting its members. Section 2 of that Act required that Congressmen should be elected by districts composed of contiguous territory, but no provision was made for equality of population.

The law continued in this condition until 1872, when Congress, by the Act of January 2, 1872, (17 U. S.

Statutes at Large, 28) added to the requirement of contiguous territory the further requirement that each district should contain as nearly as practicable an equal number of inhabitants, and similar provisions were incorporated in the Act of February 25, 1882 (22 U. S. Statutes at Large 5) and in the Act of February 7, 1891, (26 Statutes at Large, 735). By the Act of February 16, 1901 (31 U. S. Statutes at Large 735) Congress added to the requirement of contiguous territory and equality of population the further requirement that the districts should be compact, and this provision of the Act of 1901 was carried over in identical language into Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.).

The defendant contends that Congress was without authority to enact Section 3 of the Act of August 8, 1911 (title 2, Section 3, U. S. C.). As to this there is this to be said. Section 2 of Article 1 of the Constitution, as modified by Section 2 of the Fourteenth Amendment, provides that Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. Section 4 of Article 1 provides:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the place of *choosing* Senators."

The contention of defendant is that Section 4 of Article 1 vests in the respective State Legislatures the primary power to provide for the time, place and manner of electing Representatives in Congress, and that this power includes the power of laying off the districts from which Congressmen shall be elected, and that the

authority of the Congress extends only to setting aside or modifying the regulations thus enacted by the respective Legislatures. This question should present no difficulty, even if it were one of first impression. Section 4 of Article 1, giving to the Congress the right by law "to make or alter such regulations" undoubtedly contemplates a power beyond the mere right to modify or alter regulations promulgated through State law; but the matter is no longer an open question. In a long line of decisions by the Supreme Court it has been definitely established that Section 4 of Article 1 vests in the Congress the supreme power to regulate the places and manner of electing Representatives in Congress. This power undoubtedly includes the authority to require Congressmen to be elected from districts of as nearly equal population as practicable and composed of compact and contiguous territory. Whenever the Congress enacts laws governing the election of Congressmen, including, the character of the districts from which they are to be elected, such laws become the supreme law of the land, striking down all State laws in conflict therewith. See: Ex parte Siebold, 100 U. S. 371; Ex parte Yarbrough, 110 U. S. 651; Ex parte Clark, 100 U. S. 399; United States v. Mosley, 238 U. S. 383; In re Clay, 137 U. S. 731; Wiley v. Sinkler, supra, Newberry v. United States, 256 U. S. 232; Smiley v. Holm, decided April 11, 1932, 76 L. ed. 600.

I conclude that Section 3 of the Act of August 8, 1911 (Title 2, Section 3, U. S. C.) was a valid exercise of the authority vested in Congress by Section 4 of Article 1 of the Federal Constitution.

The bill alleges that the Redistricting Act enacted by the last Legislature of this State deprives the plaintiff, a citizen and elector thereof, of the right to approximately equal representation in Congress secured by

Section 3 of the Act of 1911 and the act of defendant there sought to be enjoined will be performed under color of that statute. This suit is brought to redress that deprivation. It is brought to relieve plaintiff of it and to deliver him from it. It is a suit in equity. And it is a "suit authorized by law to be brought." The meaning of the phrase may be met by the consideration that every suit to redress the deprivation of a right is authorized by law to be brought. Where there is a wrong there is a remedy. If its meaning is "authorized by statute to be brought", it is met by Section 43, Title 8, U. S. C. A., Rev. Stat. Sec. 1979, which is in these words:

> "Every person who under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceedings."

The defendant under the color of the Congressional Redistricting Act enacted by the last Legislature of this State is about to take a step and unless enjoined will take it under color of that statute which subjects the plaintiff, a citizen of the United States, to the deprivation of his right to approximately equal representation in Congress secured to him by the federal constitution and laws and a suit in equity against the defendant to enjoin her taking such step is a suit to redress such deprivation i. e., to relieve of it and to deliver him from it.

It would seem to be inescapable, therefore, as to the jurisdiction of this court as a Federal Court that the bill make out a case.

This brings me to the other contention of defendant as to jurisdiction which is that this court has no jurisdiction in equity in this cause. In considering this question two things must be accepted and kept in mind. One is that the plaintiff has the right to approximately equal representation in Congress which right is secured to him by the Constitution and the statute law of the United States. The other is that he has no adequate remedy at law in this court to vindicate such right or to redress its deprivation. He certainly could not successfully maintain a common law action for damages against the precinct election officers in the precinct in which he votes, as was done in the cases of Wiley v. Sinkler, supra; Nixon v. Herndon, supra; and Nixon v. Condon, supra, because no act of theirs, either proximately or remotely, would deprive him of the right asserted in this cause. They had nothing to do with laying off the districts, and no acts of theirs in their official capacity could furnish to him the right of equal representation which he here seeks. The failure to get such equal representation and the failure to obtain the right to vote for a member of Congress in a district composed of contiguous and compact territory could not legally be charged to any dereliction on their part. The same is equally true of the Secretary of State, the defendant in this cause. No act of hers contributed to the establishment of the districts complained of, nor can any official act of hers give to the plaintiff the right which he here seeks.

It was suggested at the argument of this case that the plaintiff did have available to him, however, an adequate legal remedy against the Secretary of State through a mandamus proceeding to compel her to certify all candidates for Congress as candidates from the State at large, rather than by districts laid off by the 1932 General Assembly. Whether such a remedy is available in the State Court, as it is well settled that

Federal District Courts are without jurisdiction to entertain original mandamus proceedings. As the plaintiff in this case is entitled to resort to a Federal Court, the adequate remedy necessary to defeat equitable jurisdiction must be an adequate legal remedy available in the Federal Court.

Unless, therefore, plaintiff can obtain relief in equity he is remediless so far as this court is concerned. It would seem that the very fact that one has a right secured by law which has been invaded and that he has no remedy at law to protect it settles that he has such remedy in equity.

In the case of

Town of Beloit v. Morgan, 7 Wall 613.

> "The power is reserved to a court of equity to act upon a principle often mentioned, namely; that whenever there is a right, it ought to be made effective. 1 Kaime Prin. Eq. 3. Where there is a right which the common law, from any imperfection, cannot enforce it is the province and duty of equity to supply the defect and furnish the remedy. Craig v. Stuyvesant, 2 Paige 92."

And in the cases of

Thompson v. Central Ohio R. R., 6 Wall 134.
Payne v. Hook, 7 Wall 425.

it was said:

> "The absence of a complete and adequate remedy at law, is the only test of equity jurisdiction."

The defendant's contention comes to this, that the federal wrong complained of is one that a federal court is powerless to right—a wrong which Section 41 (14) U. S. C. A. presupposes that it has power to right in equity if not at law. The basis of the contention is that the right sought to be enforced by redressing its deprivation is a political right and a court of equity has no jurisdiction to enforce such a right, even though it

cannot be enforced at law. The decisions involving the question as to jurisdiction in equity, of a case which presents what may be termed a political matter are extremely numerous. There is considerable confusion on the subject amongst them and it may be said that they are in conflict. The time at our disposal will not permit of a survey of them. I think, however, that it will be found on careful consideration of those relied on as denying jurisdiction in such a case that many of them present a matter which is purely political or are cases where there was an adequate remedy at law. My view of the matter is that a political right may at the same time be a legal right. Such a right is a right in a political matter. In case of such a right if it is invaded and there is no dequate remedy at law to protect it equity had jurisdiction to do so.

The defendant strongly urges that the case of
Giles v. Harris, 189 U. S. 175.
is conclusive authority for the position that a court of equity has no jurisdiction to enforce a legal right of a political nature. As I view that decision it is an authority to the contrary of this. It upholds the position that a court of equity has such jurisdiction if there is no adequate remedy at law. What is relied on is two expressions of Mr. Justice Holmes in the court of his opinion. He said:

> "The traditional limits of the proceedings in equity have not embraced a remedy for political wrongs."

Again he said:

> "The other difficulty is of a different sort and strikingly reenforces the argument that equity cannot undertake now any more than it has in the past to enforce political rights."

The significance of these expressions will be considered after it is pointed out what was actually decided by the case. It was a suit in equity brought in September 1902 in the United States Circuit Court for the Northern District of Alabama by a negro against the Board of Registrars of Montgomery Court in that State. The constitution thereof provided for registration in order to vote. It made a difference in the tests for registration before January 1, 1903 from what they were thereafter. The tests prescribed for the prior registration were easier than those for the later. The registration prior to that date was for life. Probably such was the case for the later. The plaintiff alleged that he was qualified to register under the tests prescribed prior to January 1, 1903. In March 1902 he applied to the defendants for registration and was refused. Before August 1, 1902 numerous other qualified negroes had so applied and been likewise refused. The bill was filed on their behalf as well as plaintiff. It charged in substance that a scheme had been devised by the great mass of the white population of the State to disfranchise the negroes thereof. The provisions of its constitution as to registration and voting which they had adopted had been so shaped as to give an opportunity for such disfranchisement. The intention was that they should be so administered as to let in all the whites and keep out a large part, if not all, the negroes. The defendants were parties to this scheme and accepted their offices for the purpose of carrying it out. As was intended these provisions had been so administered as to effect this purpose. The plaintiff and the negroes on whose behalf the suit was brought, though qualified to register, had been arbitrarily excluded from registering before January 1, 1903 and the same thing had been done all over the State. On the other hand the white men generally had been permitted to register. The tests prescribed for registration after January 1, 1903 were too severe to permit of the

negroes registering thereafter. Furthermore it was the intention of the great mass of the white population to keep the negroes from ever voting. Based on these allegations it was claimed that these provisions of the Constitution of the State were contrary to the federal constitution. The relief prayed was twofold. In substance it was that the defendants be required to enroll the names of plaintiff and the negroes on whose behalf he sued upon the voting lists and that the provisions of the Alabama constitution relating to registration and voting be declared to be contrary to the 14th & 15th amendments of the Constitution of the United States. The lower court dismissed the bill for want of jurisdiction as a federal court and for want of equity. The Supreme Court affirmed this decree. It did not so for want of federal jurisdiction. It held that such jurisdiction existed. It may be said that it affirmed it on the ground of want of equity. This it did, not because of the political nature of the relief sought, but because plaintiff was not entitled to the relief which he sought. He was not entitled to a declaration that the provisions of the State Constitution in question were unconstitutional and void because it would be "a mere declaration in the air." He was not entitled to the compulsory registration sought for two reasons. One was that according to plaintiff's claim the constitutional provisions as to registration were invalid. The defendants should not be required to proceed to act under an invalid law. The other reason was that such registration would be useless. It would do plaintiff no good. The names of himself and the other negroes on a "piece of paper" would not defeat the intent of the great mass of the white people of the state to keep them from voting. The only possible way in which this could be brought about was for the federal court "to supervise the voting" by its "officers." This Mr. Justice Holmes said was the "chief purpose" or "main object" of the bill. This relief could not be granted be-

cause the state itself could not be sued and the "court had little practical power to deal with the state in a body." He said:

> "Apart from damages to the individuals relief from a great political wrong, if done as alleged, by the people of the state itself must be given by them or by the legislative and political department of the State."

It was for such a political wrong as that charged in the bill i. e., the disfranchisement of the negroes by the white people of the state, that Mr. Justice Holmes in the first statement relied on by defendant had in mind when he said equity affords no remedy for "political wrongs" and it was the right to be free from such a wrong that he had in mind when he said in the second statement that equity could not enforce "political rights." He did not mean by either statement that equity had no jurisdiction to compel the defendants to register the plaintiff and the negroes on whose behalf he sued because of the political nature of the right sought to be enforced. He assumed as a matter of course that it did have such jurisdiction and hence considered the question on its merits. The right to the relief sought was denied not for want of equitable jurisdiction but for the two reasons stated, to-wit; the registration provisions were invalid and registration would do them no good according to the allegations of the bill. Hence this decision instead of being an authority for the position that equity cannot enforce a legal right which is of a political nature is a direct authority in support of the position that it can if there is no adequate remedy at law. It is to be noted that Mr. Justice Brewer who dissented on the ground that the decision of the Supreme Court should be limited to the question of federal jurisdiction and the decree reversed and case remanded for further proceeding in the lower court held that the plaintiff was entitled to the relief sought. He said:

> "That such relief will be given has been again and again affirmed in both national and state courts."

And further that Mr. Justice Harlan who dissented on the ground that the decree of the lower court should be affirmed for want of federal jurisdiction said:

> "I agree with Mr. Justice Brewer that it is competent for the courts to give relief in such cases as this."

That there is nothing in the two statements of Mr. Justice Holmes relied on adverse to the position here taken and that the decision itself supports it is evident from two subsequent decisions of the Supreme Court in which Mr. Justice Holmes rendered the opinion. One of these decisions was in the case of

Love v. Griffith, 266 U. S. 32.

That case went to the Supreme Court from the Appellate Court of Texas. It was a bill in equity brought by a negro to enjoin the Democratic Executive Committee of Houston and the judges of a primary election to be held January 9, 1921 from enforcing a rule made by the committee that negroes should not be allowed to vote at that election. At the time the case came before the Supreme Court that election had already been held. The decree of the lower court was affirmed, because the question was moot and an injunction would have been worthless. It was not affirmed on the ground that plaintiff was not entitled to the equitable relief which he sought. On the contrary, Mr. Justice Holmes, who delivered the opinion, said:

> "If the case stood here as it stood before the court of first instance, it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up."

This expression leads to believe that had the election not been held at the time the Supreme Coure delivered its opinion the political nature of the controversy would not have been regarded by the court as an obstacle to the granting of equitable relief.

The other decision was in the case of

Nixon v. Herndon, 273 U. S. 536.

It also came to the Supreme Court from Texas. It was an appeal from the judgment of one of the federal courts of that state dismissing a complaint brought by a negro against the judges of a Democratic primary election to recover damages for refusing to permit him to vote at that election, such refusal being based on a statute of the state. It was held that the complainant stated a cause of action and the judgment of the lower court was reversed. It was urged against the complaint that it was an action to enforce a political right. As to this Mr. Justice Holmes, who delivered the opinion of the court, said:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political act and may be recovered for in a suit at law hardly has been doubted for over two hundred years."

It is true that that was an action at law.

But he cited in support of the decision not only the decision in Wiley v. Sinkler, which was a law case also, but that in Giles v. Harris, which was an equity one. He saw no difference in the right to enforce a legal right because it is of a political nature, between an action at law and a suit in equity. Why should it be of any significance in a suit in equity that the legal

right sought to be enforced is of a political nature when it is of no significance in an action at law.

How far the Supreme Court will go in enforcing a legal right of a political nature appears from the later case of

Nixon v. Condon, 285 U. S.

After the decision of the Supreme Court in the case of Nixon v. Herndon the legislature of Texas enacted a statute repealing the earlier one forbidding negroes from voting in a Democratic primary and providing that the state executive committee of every political body in the state should have power to prescribe the qualification of the members of the party and to determine who shall be qualified to vote at its primary. Thereafter the State Democratic Executive Committee adopted a rule limiting the right of participation in primaries to white persons. It was held that thereby that committee was created a state agency and its rule was in violation of the federal constitution and that a negro who had been refused a vote in a Democratic primary had a right of action to recover damages for such refusal.

The position here taken as to equitable jurisdiction is that of the Court of Appeals of Kentucky.

Eugan v. Gerwe, 112 Ky. 232.
Brown v. Garr, 119 Ky. 720.
Neal v. Young, 75 S. W. 1082.
Stiglitz v. Schrader, 239 Ky. 799.
Ragland v. Anderson, 125 Ky. 141.

For the reasons stated, I am constrained to hold that equity is competent to give the relief sought.

I come now to a consideration of the validity of the Re-districting Act.

In dividing the State into Congressional districts under the provisions of Section 3 of the Act of August 8, 1911, the State Legislature undoubtedly has a wide discretion, and its good faith exercise should not be disturbed by the court. But where the result leaves no escape from the conclusion that there was no good faith attempt to comply with the National statutory requirement of practical equality of population and or of contiguous and compact territory, the court should not hesitate to declare the legislative act void. A study of the Redistricting Act here involved satisfies me that the General Assembly made absolutely no effort to comply with the Federal statutory requirement of practical equality of population and no good faith effort to meet the requirement of compactness of territory. Indeed, it is difficult to contemplate the result without concluding that the Act was framed in deliberate disregard of the Federal statute.

The population of the State, according to the 1930 census, is 2,614,589. Under the Congressional Reapportionment Act this population entitled Kentucky to nine Representatives in Congress, instead of eleven as formerly allowed. Under an ideal redistricting act each of these nine districts would contain in round numbers 290,500 inhabitants. Owing to the fact that Jefferson County has a population of 355,550, which is in excess of this number but not enough to make two districts, and owing to the practical considerations against throwing a part of this county into another congressional district, the action of the Legislature in erecting this county into a single district cannot be regarded as a violation of the spirit of the Federal Act.

After the creation of Jefferson County as a congressional district, there were left one hundred and nineteen counties, with a total population of 2,259,239 out

of which to erect the remaining eight congressional districts apportioned to the State. Under an ideal redistricting act each of these eight districts would have in round numbers of a population of 282,400. None of these counties has a population of as much as 100,000. One, Kenton County, has in round numbers 93,500; one, Campbell County has 73,391, and only three others, Fayette, Harlan and Pike, have in excess of 60,000. The average population of the one hundred and nineteen counties outside of Jefferson is slightly less than 19,000 and the average, eliminating the counties of Jefferson, Kenton, Campbell, Fayette, Harlan and Pike, is less than 17,000, and each of seventy-five of the counties has a population of less than this average, and each of twenty-eight of the counties has less than 10,000 population.

In view of this situation, the Legislature was confronted with no difficulty whatever in dividing these one hundred and nineteen counties into eight congressional districts of substantially equal population, and this without the necessity of dividing any county; and the topography of the State presents no obstacle to carving these districts out of contiguous and compact territory. An example of the ease with which these one hundred and nineteen counties can be erected into eight congressional districts, composed of contiguous and compact territory and with substantially equal population, the court, during the argument, called upon counsel for the plaintiff to file a map showing if and how this could be done. Such map was prepared and filed as an exhibit in the case. This map shows that these counties could have been laid off into eight congressional districts with no greater difference in population between them than approximately 4,000 people, and this without doing violence to the requirement that the districts must be composed of compact and contiguous territory. Of course, I do not mean

to intimate that the legislative act should be declared void because it is not in substantial compliance with the tentative districting shown by the map referred to. I simply mean to hold that this tentative districting of the State, as disclosed by the map referred to, clearly shows no real difficulty confronted the Legislature in substantially complying with the Federal Law.

Instead of doing so, however, the Legislature without any reason whatever so far as I can discover, other than the exigencies of practical politics, in redistricting the State worked out a gross inequality in population between the respective districts. To the First District, beginning at the Mississippi River and extending eastwardly between the Ohio River on the North and the Tennessee line on the South, were allotted counties containing a population of 238,189. The Second District, which is the very next district to the East from the First District and which extends from the Ohio River to the Tennessee line, was given a population of 338,117, or substantially 100,000 more population than was assigned to the First District, and substantially 100,000 more population than the Fourth District, which is the district to the East of and adjoining the Second. To the East of the Fourth is the Sixth, containing a population of 317,591, or approximately 80,000 more than either the Fourth or the First. To the South of the Fourth and the Sixth lies the new Ninth with a population of 352,869, or approximately 114,000 more than the population of either the First or the Fourth, and with a population of approximately 107,000 in excess of the new Seventh which adjoins the Ninth on the North and East and has a population of 245,598. The Ninth has a population of approximately 65,000 in excess of the new Eighth, which lies along the eastern boundary line of the State and between the Ohio River and the Seventh, and

more than 112,000 in excess of the new Fifth District, which lies along the Ohio River and north of the central part of the State. The discrimination in population against the Second and Sixth Districts, and in favor of the Fifth, Seventh and Eighth, is only slightly less than glaring. In view of the ease with which these discriminations could have been avoided, we are forced to the conclusion that no attempt was made to avoid them, but that other considerations than the securing of equality of population dictated the laying out of these districts.

Not only did the Legislature disregard the requirement of substantial equality of population, but the new Fifth District, especially outrageously violates the requirement of compactness of territory. Its shape very much resembles a French style telephone, with the counties of Oldham, Trimble, Carroll, Gallatin, Boone, Kenton and Campbell strung along the River forming the handle of the telephone, and the county of Shelby on one end and the counties of Grant and Pendleton, on the other end forming the mouthpiece and receiver respectively. Henry and Oldham and the northern parts of Franklin and Scott counties project, appendix-like between the eastern and western ends of the district. In any good faith attempt to make the Fifth District a compact one, as required by the Federal Statute, Owen and Henry Counties, with a population of 10,710 and 12,564, respectively, certainly would have been included. Irrespective of the inequality of population between the districts, a visual examination of the outlines upon the map of the new Fifth District is sufficient to repel any presumption of a good faith attempt on the part of the Legislature to comply with Section 3 of the Act of August 8, 1911.

The Redistricting Act in its entirtey must, therefore, be declared invalid. As heretofore stated an order con-

forming to the views herein expressed had already been entered.

A. M. J. COCHRAN, *Judge.*

September 3, 1932.

CERTIFIED

(Seal, U. S. Dist. Court, East. Dist. of Kentucky.)

(Signed) S. W. STORY, *Clerk, U. S. Court,*

By Florence Dunham, D. C.